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No. 85-210

In The
Supreme Court of the United States
October Term, 1985

TOWN OF SAUGUS AND FRED FORNI,
Petitioners

v.

JAMES T. VOUTOUR,
Respondent

On Petition for Writ of Certiorari to Review
A Judgment of the United States Court of Appeals
for the First Circuit

BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED FOR REVIEW

I. May A Municipality And Its Chief of Police Be Held Liable Under § 1983 For Gross Negligence In The Training Of Police Officers, Including, But Not Limited To, The Failure To Comply With a Mandatory State Statute, Where The Evidence Submitted In Opposition To A Motion For Summary Judgment Includes An Expert Opinion That The Gross Negligence In Failing To Train The Police Officers Was A Proximate Cause Of The Plaintiff's Injury?

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STATEMENT OF THE CASE

STATEMENT OF FACTS

A. The Shooting of Voutour.

According to the petition filed by the Town of Saugus (Saugus) and Fred Forni (Forni) the defendant Harold Vitale (Vitale) shot Voutour in order to stop Voutour's automobile because Vitale's partner, Howard Wheeler (Wheeler) was being dragged along "while the engine of the car was revving at high throttle" (petition, p. 5). In this and other respects the Saugus and Forni have failed to state the facts most favorable to the plaintiff. Accord-

ingly, since the posture of the case arose on defendants' motions for summary judgment it is necessary to state the facts most favorable to Voutour.

As Wheeler was approaching the passenger door of the Voutour vehicle and reaching for the door handle, Voutour pressed down on the accelerator and the car skidded slightly to the right grazing Wheeler (A. 429, 431-433, 444, 483, 484, and 488). Wheeler states that he responded by grabbing the door handle with his right hand and deliberately struck the window (intending to break it but failing) with the flashlight in his left hand (A. 439, 485, and 486). According to Wheeler he then hung on to the door handle with both hands during which time he was dragged approximately 60 feet during a period of 50 to 60 seconds. (A. 490). If this estimate were correct, then Voutour's approximate speed would have been .82 to .88 mph (or less than one mile per hour). On the other hand, Wheeler elsewhere testified that he held on for a period of 15 to 20-25 seconds (A. 487). If he was holding on for 15 seconds, the speed of the vehicle for a 60 foot distance would have been 3.5 mph (see also A. 602-604).

According to Wheeler the "tires were spinning, very rapid, RPM's making a real loud noise." (A. 487). At the probable cause hearing[1] Vitale testified, "I heard

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[1] There was a probable cause hearing on October 27 and 28, 1977 concerning various criminal charges brought against Voutour (A. 373, n.2). Voutour was subsequently indicted for assault and battery with a dangerous weapon (his car) on officer Wheeler, refusing to stop for a police officer, and a one-way street violation. The first criminal trial ended in a mistrial; the second with a plea of guilty for failure to stop when signaled at the Gibbs parking lot and the one-way street violation, and payment of the minimum statutory fines totaling $30.00. The felony charge was dismissed (A. 373, n.2; also see A. 427, and 429-494).

Officer Wheeler yell to me, 'Harry get me off . . . [the] motor was racing, it was at a very high RPM. It sounded like it was at a full throttle and the wheels were spinning hard enough, causing a sirening effect noise" (A. 455 and 446). Wheeler stated that he let go "as soon as the high pitch of the tires slowed down." (A. 430).[2]

When Voutour put his car in "park" on Long Place, he again saw the same vehicle drive around onto Long Place and park directly behind him (A. 520; also see A. 535).[3] Voutour states, "I got angry because I got out of the way of someone who was still behind me. . . . I just

---

[2] When the wheels stopped spinning is a matter of dispute. According to Vitale the vehicle did not stop accelerating until after he fired the shot. (A. 86). When asked how Voutour could have opened the door after he received such a disabling injury, Vitale gave the following incredible testimony at the probable cause hearing:

> "I feel that after I shot him the nerves in his body were there long enough for a snap reaction to open the door." (!)

(A. 450). Not only is this account disputed by Voutour but James Fyfe, the plaintiff's expert, pointed out that the left interior door handle of the Voutour vehicle cannot be opened with "a single upward movement as is true of most automobile interior door handles. Instead, to open the door of Mr. Voutour's automobile from the inside, one must pull a spring-loaded handle upward and toward the interior of the car. Having done this, one must then exert upward pressure on the handle to disengage the lock." (A. 586).

[3] Voutour stated: "I believed it was anybody but a police cruiser. If it was a police cruiser there would have been a light or siren." (A. 522).

wanted to get out of there, go to my friend's house. So I put the car in drive and started to leave. And when I started to leave, there was a thump on the car. . . ." (A. 521).

Thereafter he never heard anything from outside the car (A. 526, 527, and 534). The motor vehicle was not swinging while it traveled on Long Place "because the road was rutted from past travel and from traffic on the road. There were tire ruts and the vehicle tended to follow the ruts" (A. 447). The parties were in agreement that the wheels were spinning; the tires were bald and Voutour did not have snow tires on the vehicle (A. 429 and 523).

After the "thump" on the passenger side there was a period of time which lasted "maybe a second, or not even that" before MacDonald, sitting in the front seat, passenger side, recognized that the person outside the vehicle was a police officer and he thereupon yelled out "It's the police! Stop!" (A. 521). (Dionne also shouted for Voutour to stop (A. 521).) Voutour hearing this immediately took his foot off the accelerator and began pumping the brake (A. 521). The factfinder may infer from this testimony that the sound of the spinning tires, which was like a "screaming noise", according to Wheeler (A. 429; also see A. 445, 446 and 487), died down. The court may also infer from the affidavits of James W. Voutour (Voutour's father), Mercaldi, and Finan, that Vitale saw the brake lights go on since they were in proper working condition after the shooting (A. 557-562).

Voutour then states:

> . . . as I was pumping the brakes to stop the car, the car was having difficulty stopping where the road

> was icy and slushy. The brake fluid was lower earlier, and I thought I was leaking brake fluid. I opened the door and put my left foot out. I was pumping the brakes with my right foot and was getting ready to put the car into park.

(A. 521 and 522).[4]

At that point, as his body was turned and the vehicle was slowing down, he was shot and fell out of the car (A. 524). According to MacDonald, "he opened the door and I guess he was getting out because we were almost at a dead stop before he got shot." (A. 458 and 459). Thereafter MacDonald, as the car was slowly rolling forward, placed the vehicle into "park" and it came to a complete halt (A. 492 and 493).

ment in June, 1963, seven departmental citations, promoliberation:

> I took a stable stance, squatted position as I have been trained to do for accurate shot, picked the shoulder area of the operator of the vehicle, took an aim, and I fired a shot into the shoulder area.

(A. 491).

Voutour was struck on the left side of his neck and immediately fell out of the car door: "The car almost ran over my leg. I tried to move my leg and I couldn't." (A. 469). As officer Vitale approached Voutour, he attempted to move his hand since he thought the officer would step on it and was unable to do so (A. 470). The officer "put his hand on my throat, checked my pulse and

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[4] Elsewhere Voutour testified that the car ". . . was almost at stop. . . I had the door open. I had my leg out. The next thing I was going to do was put the car in park and get out." The car ha dtraveled "three car lengths maybe" while Voutour had his foot on the accelerator (A. 524).

as he left he said to another police officer, 'this is going to be a very hush, hush case. . . .'" (A. 470, 471 and 528).

According to officer Vitale, immediately after the shooting, he went to Voutour and "I gave him my finger and asked him to squeeze it, but I got no response at all from him" (A. 448 and 449). Voutour never lost consciousness (A. 529). The court may infer from Voutour's physical condition when he was on the ground that he had been paralyzed as of the moment he was shot and thus, contrary to Vitale's story, the vehicle was slowing down with the driver's door open at the time Voutour was shot.[5]

After the shooting of Voutour, MacDonald was slammed up against the car, beaten, thrown down on the ground and kicked; he was hospitalized for three days as a result of his beating (A. 456, 457, and 460). No Saugus police officer was ever disciplined or even reprimanded for any action taken on February 14, 1977.

B. Training of Saugus Police Officers

1. In order to assist him in evaluating this aspect of the case, Voutour retained a nationally recognized expert on police procedures and practices, Fyfe (A. 341-

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5 See also Exhibit "D" to Plaintiff's Answers to Interrogatories wherein Dr. Murrary Freed states: "It is my opinion to a reasonable degree of medical certainty, that Mr. Voutour was rendered immediately quadriplegic as a result of the shooting and I can determine no way by which he could have opened the motor vehicle after the shooting" (A. 369).

360).[6] Fyfe's work experience included being hired as a Police Academy recruit by the New York Police Department in June, 1963, seven departmental citations, promotion to Sergeant, Patrol Sergeant, and finally Lieutenant, in November, 1977 (A. 351 and 352). His educational background included a B.S. in Criminal Justice at the John Jay College of Criminal Justice, an M.A. in Criminal Justice at the State University of New York (1972), and a Ph.D. in Criminal Justice, State University at Albany (1978) (dissertation: "Shots Fired: An Examination of New York City Police Firearms Discharges") (A. 350). Furthermore Fyfe has been Associate Professor at the American University School of Justice in Washington, D.C., as well as a Senior Fellow at the Police Foundation in Washington, D.C. (A. 350). In addition, Fyfe has authored numerous articles involving the use of deadly force and has lectured extensively on that topic and related topics (A. 354-359). Finally, Fyfe was retained as an expert by the United States Department of Justice in 1979-1980 to analyze the police use of deadly force in Philadelphia, 1975-1978, and he has been retained as an expert in matters of police procedures and practices on numerous other occasions (A. 353 and 354).

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6 In their petition Saugus and Forni repeatedly refer to Fyfe as a "purported expert" (petition, see, for example, p. 6, n. 6). Voutour confesses to be somewhat puzzled by this description. Fyfe was accepted as an expert witness in the trial before the district court and this court recently cited an article by Fyfe entitled "Observations on Deadly Force" 27 Crime and Delinquency, 376, 378-381 (1981) as authority for the proposition that there is no empirical evidence that the meaningful threat of deadly force leads to the arrest of more live suspects by discouraging escape attempts. *Tennessee v. Garner*, — U.S. —, 105 S. Ct. 1694, 1701, n.10 (1985).

At both the hearing on the motions for summary judgment (A. 847-850), and in his motion for partial reconsideration (A. 879-883), Voutour brought Fyfe's qualifications to the attention of the district court. On neither occasion did the defendants question Fyfe's qualifications as an expert on police procedures and practices (A. 826-845, 865-871, and 884-888). Indeed the district court subsequently permitted Fyfe to testify as an expert as to proper police practices in the trial involving Vitale (A. 1043-1072; see especially A. 1052, 1054, 1059, 1061, 1063, 1066 and 1072).

The Fyfe affidavit extensively discusses the position of Saugus that it sent its officers to training academies and conducted in-service training for its police officers.[7]

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[7] The significance of the in-service training programs may be evaluated in part by looking at the amounts requested by the Chief and approved by the budgets for this matter:

In-Service Training:

Budget Year:	1973	1974/75	75/76	76/77
Requested/ Approved & Expended:	$750/ 692	$700/ 565	$700/?	$700/?

(1973 Budget covered 18 month period) (A. 566-569; also see A. 422). Also see Forni's deposition in which he complained that while he would recommend budgets "the Town Manager could either cut something out, from there it went to the Board of Selectmen, who did the same thing. . . ." (A. 546), and "funding was cut back many times" (A. 548). Furthermore, Chief Forni (and his command staff) complained "that in-service training at roll call for 30 minutes is not adequate or effective. . . . It is my recommendation that funds be made available for a minimum of 2 week per man year in addition to payment for training personnel be made available" (A. 570). In its petition Saugus and

(Continued on next page)

In particular Fyfe pointed out that notwithstanding the mandate of G.L. c. 41, § 96B that police officers receive specified training within nine months of their appointment, Vitale did not receive his training until some seven years after his appointment as a regular police officer (A. 662). As for the in-service training program, in addition to Fyfe's analysis (A. 659-673), it is worth reviewing the testimony of Wheeler wherein he stated:

> Q. . . . did you receive any training as police officer before you went to the Saugus force?
>
> A. Before, no.
>
> Q. And did you receive any on-the-job training up to the time of this incident? [The shooting of Voutour.]
>
> A. Yes, sir. They usually try to put you with the senior officer.
>
> Q. Your training was on-the-job training at that time?

(Continued from previous page)

Forni claim that "The plaintiff has adduced no evidence whatsoever that Forni's request for additional funds was not promptly acceded to by the Town; indeed, the record demonstrates that in the period prior to Voutour's injury in-service was conducted in full hour sessions, not the 30 minute sessions described by Forni in the undated proposal." (petition, p. 23, n.12). This is only one instance in which the Town and Forni make a statement of fact without a record reference. In addition, with respect to additional funds, it is the defendant's burden on a motion for summary judgment to demonstrate that there exists no genuine issue of material fact as to whether the request for additional funds was acceded to by the Town. The defendants failed to meet this burden. Furthermore, the factfinder could infer from the budgets before the court for the years 1973-1977 that for that period of time additional funds were not provided. (Supplementary Appendix 7-31).

A. Yes.

Q. Up to the point of this incident?

A. Yes.

(A. 422-423).

The "senior officer" with whom Wheeler was put on the night of the shooting was Vitale, who himself had not received training mandated by G.L. c. 41, § 96B. Saugus also relied upon Vitale's "firearm proficiency" which he had obtained through membership in hunting clubs and the National Rifle Association prior to being employed by Saugus (A. 271). This misapprehended the claim. Voutour does not allege that Vitale cannot shoot straight, but rather that he was never provided with training as to when to shoot and when not to shoot, or, if he were, it was done in a grossly negligent or otherwise culpable fashion. Given the claim made by Voutour, much of what Saugus and Forni said about Vitale's knowledge of firearms is simply irrelevant. As the Fyfe affidavit explained in great detail, the prior training or experience Vitale received concerning firearms was totally inadequate to his duties as a Saugus police officer (A. 659-673).

The description by Saugus of training allegedly provided to its police officers is almost wholly in conclusory language. Thus Forni states in his affidavit that officers were given "considerable firearms training". (A. 90). In their petition Saugus and Forni refer to "extensive training", "substantial firearms training", and "considerable informal training" (petition, p. 6). The answers to interrogatories, however, acknowledge that "no formal examinations were given" in connection with firearm training (A. 106). A jury would not be compelled

to accept Saugus' conclusory description of its in-service training and could believe Fyfe's opinion that it was reckless and grossly inadequate (A. 668-670).

Saugus also states that "most importantly, each officer was informed of, and required to follow, the written firearms policy of the Saugus Police Department (A. 91)." (petition, p. 7). The record contains, however, evidence from which a contrary inference could be drawn. Thus at the deposition of Capt. Maillet he testified that he was ordered by Chief Forni to provide each police officer on the 1 a.m. to 9 a.m. division with a copy of the May 7, 1975 "Policy Procedure governing the use of Firearms" and he testified "I am not sure if everybody did [initial the sheet indicating that they had read and received the policy]. I don't know if I got everybody or not" (A. 421, n.29). When this testimony was provided on April 16, 1982, counsel for Saugus and Forni expressly represented that a copy of the sheet referred to by Capt. Maillet would be produced. As a precautionary measure, Voutour on May 5, 1982 filed a request for production of the document (A. 5) and when it was provided on June 7, 1982 (A. 6) it plainly indicated that neither Vitale nor Wheeler had received the May 7, 1975 policy (A. 682 and 685; also see A. 6, 668, 669, 691, and 714-716). The document expressly stated:

"ALL OFFICERS READ AND INITIAL". (A. 685)

No initials appear next to Vitale's and Wheeler's names and a jury could infer from the testimony of Capt. Maillet and this document that they did not receive the May 7, 1975 policy notwithstanding a contrary affidavit in the record.

———o———

ARGUMENT

I. Certiorari Should Be Denied Because This Case Is At An Interlocutory Stage And Not Final And As Such Is Not Ripe For Review.

The case was before the Court of Appeals to review summary judgments granted by the district court. The Court of Appeals reversed the district court on one issue and remanded the case to the district court for further proceedings on that issue. Therefore, this case is not in an ideal posture for review by this Court. The case is at an interlocutory stage and as such is not ripe for review by this Court. *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 88 S. Ct. 437, 438 (1967). The normal practice for this Court in such a situation is to deny interlocutory review.

The Court should follow its normal practice in this case. This case is not ripe for review. The record is not complete. The case should be tried first so that the record is complete. The issues argued by Saugus and Forni may become moot or disappear at trial. Also, on remand the district court will have an opportunity to review the admissibility and the legal sufficiency of the evidence actually submitted by the parties. Therefore, this Court should deny certiorari in this case.

II. Certiorari Should Be Denied On The Issue Of Whether An Unconstitutional Municipal Policy Must Be Adopted For Liability Under 42 U.S.C. § 1983.

The Petitioners claim that the Town must have adopted a policy which itself violates the Constitu-

tion in order to be liable under 42 U.S.C. § 1983. Petition at 11-12. This issue should not be addressed by this Court at this time for the reasons set forth in the preceding section. In addition, there is no conflict between the federal courts of appeals on this issue so there is no need for the Court to address it at this time. The Petitioners assert that there is a conflict between the *Voutour* decision and decisions by other federal courts of appeals. Petition at 13-14. Contrary to this assertion, there is no such conflict. The Petitioners cite several federal cases for the proposition that there must be an unconstitutional municipal policy or custom in order to impose liability under 42 U.S.C. § 1983. See Petition at 13-14. None of the cases cited by the Petitioners, however, stand for such a proposition. *See Wellington v. Daniels*, 717 F.2d 932, 936 (4th Cir. 1983) (where established policy of failure to supervise by showing widespread abuse then municipality liable for a deprivation of constitutional rights by conduct pursuant to such policy); *Languirand v. Hayden*, 717 F.2d 220, 227-228 (5th Cir. 1983), *cert. denied*, — U.S. —, 104 S. Ct. 2656 (1984) (municipality liable for failure to train where a pattern of similar incidents or serious incompetence is widespread); *Lenard v. Argento*, 699 F.2d 874, 885 (7th Cir.), *cert. denied;* — U.S. —, 104 S. Ct. 69 (1983) (follows *Hays v. Jefferson County, infra*); *Hayes v. Jefferson County*, 668 F.2d 869, 874 (6th Cir.), *cert. denied*, 459 U.S. 833 (1982) (municipality liable for failure to train or supervise where among other things training so reckless or grossly negligent that misconduct almost inevitably or substantially certain to result); *Turpin v. Mailet*, 619 F.2d 196, 201 (2d Cir.), *cert. denied*, 449 U.S.

1016 (1980) (liability for failure to act where know of constitutionally offensive acts). None of the above-cited cases required an unconstitutional "policy" to be adopted in order to establish liability.

The Petitioners also incorrectly state that this Court in *Polk County v. Dodson*, 454 U.S. 312 (1981), suggested that a municipal policy or custom must itself be unconstitutional to impose liability under 42 U.S.C. § 1983. *See* Petition at 13. Rather, the plaintiff in *Polk County* alleged that the action of the Offender Advocate's office in failing to represent him on his appeal of a criminal conviction violated his constitutional rights. *Polk County*, 454 U.S. at 314-315. Thus, the case involved a claim that there was an unconstitutional policy which the Court found was not supported and the Court's statements must be read in the context of the case presented.

In addition, the Court should not grant certiorari because it is too early for the Court to address this issue.

The Court should wait to observe how further litigation on the issue proceeds in other courts and to observe the types of situations involved in such cases before deciding this issue.

Furthermore, the Petitioners' position on the issue is incorrect and ignores the legislative history of § 1983. An unconstitutional official municipal policy or custom is not required for liability to be imposed on a municipality under 42 U.S.C. § 1983. 42 U.S.C. § 1983 was enacted because of the failure of certain states to enforce laws. *See Monroe v. Pape*, 365 U.S. 167, 174-176 (1964), *overruled in part on other grounds, Monell v. Department of Social Services*, 436 U.S. 658 (1978). The problem perceived by

Congress in enacting 42 U.S.C. § 1983 was not that municipalities or other governmental entities were adopting "official" policies, rules, or statutes which abrogated the constitutional rights of citizens but rather that there was toleration by officials of unconstitutional conduct.

As the Fifth Circuit Court of Appeals observed:

> The legislative history reveals that the Reconstruction Congress sought to protect constitutional rights and to wipe out Ku Klux Klan violence in the southern states. The debates in Congress occasioned much emotion and rhetorical skill. Waxing eloquent on the failure to protect individuals' constitutional rights, Representative Perry cried, "sheriffs, having eyes to see, see not; judges, having ears to hear, hear not. . . . In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection."

Webster v. City of Houston, 689 F.2d 1220, 1224 (5th Cir. 1982), *on rehearing*, 735 F.2d 838 (5th Cir. 1984) (quoting from Con. Globe, 42d Cong., 1st Sess., 447 (1871)). The Town of Saugus had a duty to undertake adequate procedures to select and train police officers to prevent the misuse of their firearms. By its gross negligence in breaching this duty, Saugus exposed itself to liability for deprivations of constitutional rights "caused" by the policy of failure to adequately train its police officers.

III. Certiorari Should Be Denied On The Issue Of Causation Under 42 U.S.C. § 1983

The Petitioners contend that, upon the evidence before the Court of Appeals on the review of the summary judgments, a jury could not find that any policy of the Peti-

tioners with respect to training "inflicted" Voutour's injury. Petition at 18. The Petitioners seek this Court's review of the evidence which is not a function of this Court. Whether the Petitioners' policy or custom was the moving force behind the deprivation of Voutour's constitutional rights is a question of fact for the jury at trial based upon all the factual evidence and expert opinions. Fyfe, the plaintiff's expert, has submitted his expert opinion that the Town's failure to train was the moving force behind the shooting. (See A. 584, 650, 662, 668).

There is no conflict between the causation requirements under 42 U.S.C. § 1983 as set forth in this Court's decisions in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), *Rizzo v. Goode*, 423 U.S. 362 (1976), and *Oklahoma City v. Tuttle*, — U.S. —, 105 S. Ct. 2427 (1985) and the causation requirements applied by the Court of Appeals in *Voutour*. Under *Monell*, 42 U.S.C. § 1983 imposes liability on a government that, under color of some official policy, "*causes*" an employee to violate another's constitutional rights. *Monell*, 436 U.S. at 692. According to *Rizzo* there must be an *affirmative link* between the unconstitutional deprivation and the municipal policy or custom. *Rizzo*, 423 U.S. at 371. In *Tuttle* the Court in discussing municipal liability continually referred to *causation*. Tuttle, 105 S. Ct. at 2432, 2433, 2436. The *Tuttle* Court declared that a plaintiff must establish that the municipality "*caused* the plaintiff to be subjected" to the deprivation of his constitutional rights. *Id.* at 2432-2433. Liability under 42 U.S.C. § 1983 is imposed for deprivations *caused* by a municipal custom or policy. *Id.* at 2433 (citing *Monell*).

The Court of Appeals decision in *Voutour* was made in light of the Supreme Court decisions in *Monell* and *Rizzo*. *See Voutour*, 761 F.2d at 820. The *Voutour* decision specifically acknowledged *Monell's* requirement that official policy must be "the moving force of the constitutional violation." *Id.* The Court of Appeals decision also cited the *Rizzo* requirement that an affirmative link between the conduct of a supervisor and an employee be shown to impose liability on a supervisory official. *Id.* at 819-820. Thus, the *Voutour* decision was based upon the ability of a jury to find that the municipal policy or custom was the moving force behind the violation of Voutour's constitutional rights in accordance with *Monell* and there is no conflict for this Court to resolve.

Even if the Court of Appeals decision was that the municipal policy or custom could be found to be the "proximate cause" of the deprivation of constitutional rights, there is no substantive difference between the proximate cause standard and the moving force standard. The Petitioners appear to claim that the moving force standard requires more than the proximate cause standard but does not offer any explanation of the difference between them or what more is required. *Monell*, *Rizzo*, and *Tuttle* all speak in terms of causation. *Monell*, 436 U.S. at 691, 692; *Rizzo*, 423 U.S. at 371, *Tuttle*, 105 S. Ct. at 2432, 2433, 2436. The petition submitted by the Petitioners itself speaks in terms of causation. See Petition at 15, 16-17. A definition of proximate cause of an injury is "the primary or *moving cause*, or that which, in a natural and continuous sequence, unbroken by any efficient, intervening cause, produces the injury and without which the accident could not have happened." Black's Law Dictionary (5th

ed. 1979) (emphasis supplied). Thus, within the definition of proximate cause is the requirement that the act or custom or policy be the moving cause or moving force. The *Tuttle* Court referred to the need to establish a policy as *a* moving force. *Tuttle* at 2436 at n.7. It did not refer to *the* moving force. *See id.* Thus, moving force is another phrase for proximate causation. There is no stricter criterion which can be imposed.

In addition, the Petitioners have waived their right to raise this issue. In their brief to the Court of Appeals, the Petitioners did not take issue with the District Court's use of the proximate cause standard to evaluate the case. (See Appeal Brief at 20-25; A. 40a.)

IV. Certiorari Should Be Denied Because No Conflict Exists Between The Decision Of The Court Of Appeals And Decisions Of This Court With Regard To The Existence Of A Municipal Policy Or Custom And Liability Under 42 U.S.C. § 1983.

Municipal liability under 42 U.S.C. § 1983 is predicated upon the existence of a municipal policy or custom. The Petitioners claim that there was no evidence of any municipal policy or custom regarding training of police officers upon which § 1983 liability could be based. Petition at 19-20. The Petitioners are actually unhappy with the issues of fact found by the Court of Appeals and are asking this Court to adopt other findings. Fact finding is not a function of this Court. The Petitioners also continue to state the facts most favorable to them which is the incorrect standard under summary judgment. They repeatedly state in their petition that there was no evidence whatsoever upon which to find a municipal policy or custom. See Peti-

tion at 19-24. The Petitioners, however, then refer to evidence cited by the Court of Appeals to support its finding of a triable issue claiming that such evidence does not support the findings of the Court of Appeals. See Petition at 22 n.12. Thus, the Petitioners actually are dissatisfied with the Court of Appeals factual findings.

There is ample evidence to support the Court of Appeals decision. The letter from Captain Maillet regarding the three prior shootings is instructive not only on the issue of the adequacy of disciplinary action but also on the issue of the problem the officers had in deciding when to shoot and when not to shoot and that the Chief and Town were aware of the problem. (See A. 542-545). There are also factual disputes as to the adequacy and effectiveness of the in-service training based upon the proposal by Forni and the analysis made by Fyfe, an expert in the area of police procedures. *Voutour*, 761 F.2d at 821-822. (A. 668-673).[8]

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[8] The Petitioners also claim that the Court of Appeals acknowledged that the plaintiff had adduced no evidence that any omissions in training were even known to Saugus. See Petition at 19. The Court of Appeals acknowledged, however, that the issue of the Town's knowledge of Chief Forni's statutory disregard in Vitale's training was never pursued by the parties or addressed by the district court. *Voutour*, 761 F.2d at 823. The Court of Appeals distinguished the Town from the Chief on its own initiative. The relationship of the parties is a question of fact for a jury. The Court of Appeals did not decide that the Chief's knowledge could not be found to be the knowledge of the Town. Also, in this case, the Town has waived its right to assert that the Chief was not the policymaker for the Town with regard to the training and supervision of the Town's police officers. The Town and Chief Forni have had the same

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The petitioners assert that the Court of Appeals decision is in conflict with this Court's recent decision in *Oklahoma City v. Tuttle*, — U.S. —, 105 S. Ct. 2427 (1985). The *Tuttle* Court held that proof of a single incident of unconstitutional activity was sufficient to impose municipal liability where there was proof that the incident was caused by an existing, unconstitutional municipal policy. *Id.* at 2436. The *Tuttle* Court also held that where the policy relied upon to impose liability is not itself unconstitutional, proof of a single incident will not be enough to establish fault and a causal connection. *Id.*

The Court of Appeals decision is not in conflict with *Tuttle* for several reasons. First, *Tuttle* had not been decided by this Court at the time the Court of Appeals decided *Voutour*. In addressing the petitioners' motion for reconsideration, the Court of Appeals instructed the district court to which the case was remanded that once *Tuttle* was decided by this Court, the district court should abide by *Tuttle*. *See Voutour, supra*, 761 F.2d at 827. The Court of Appeals announced that:

> Needless to say, when this case goes back to the district court, this circuit's directions in the current opinion must yield to any rulings the Supreme Court may by then make in *Tuttle* or elsewhere. To the extent the Supreme Court in *Tuttle* lays down principles that differ from any of our present rulings, the district court on remand may and should apply its best under-

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counsel since the case's inception up to the present time. If the Chief was not the policymaker then there would have been a conflict of interest between the Chief and the Town and they could not have been represented by the same counsel. Neither the Town nor the Chief ever took the position that the Chief's knowledge not not the knowledge of the Town and, therefore, no counter-evidence on that issue was submitted by Voutour.

> standing of the Court's decision without further application to us.

Id. Thus there is no need for this Court to review this case because the district court can handle the case on remand in accordance with *Tuttle* on a full record.

Furthermore, there is no real conflict between this Court's decision in *Tuttle* and the *Voutour* decision. In *Tuttle*, this Court dealt with the question of whether a single isolated incident of unconstitutional activity can show a general pattern evidencing a municipal policy. *Tuttle*, 105 S. Ct. at 2431 n.2. The Petitioners contend that, in *Voutour*, the Court of Appeals inferred a municipal policy or custom from one incident of police misconduct (the Voutour shooting) or one omission in training or supervision. Petition at 21. The Court of Appeals, however, did not rely on the shooting incident alone as establishing a policy. The Court of Appeals also relied on the conscious decision by Chief Forni to violate state law by not sending police officer(s) to police training school as required by state law. The *Tuttle* Court itself acknowledged that "the word 'policy' generally implies a course of action consciously chosen from among various alternatives; . . . ." *Tuttle*, 105 S. Ct. at 2436. Also, the Voutour shooting was not the only shooting incident involving the Saugus police department. There were three shooting incidents on the 1 a.m. to 9 a.m. division in the eleven months prior to the Voutour shooting.

The Petitioners claim that no evidence was adduced that any officer other than Vitale was improperly trained. Petition at 22. The documents submitted by the Petitioners in support of their motion for summary judgment did

not foreclose the possibility that other police officers were not sent to police training school at all or were not sent until some time after the time required. This Court should not decide such factual disputes.

Further evidence that there is no conflict between the decisions in *Tuttle* and *Voutour* is that the Court of Appeals in *Voutour* expressly acknowledged that an isolated incident of excess force could not form the predicate for the customary use of excess force by the police department. *Voutour,* 761 F.2d at 820 n.5. Thus, the *Voutour* decision is in agreement with the *Tuttle* decision on this very issue.

Even if the evidence established that Vitale was the only police officer improperly trained, the Town could still be liable under § 1983. The municipal custom was to inadequately train Vitale and to send him out on patrol knowing that he had not received the required training. Unlike the *Tuttle* case, in *Voutour* there is direct evidence as to the Town's customs and policies with regard to the police officer involved in the unconstitutional conduct. For example, an individual's constitutional rights are still violated whether a Town has a custom or policy of allowing its entire police force to use excess force or its custom or policy is to allow one particular police officer to use excess force. The Town would have a municipal policy or custom as to that one officer. All the *Tuttle* decision requires is that a plaintiff show more than one incident to show the policy existed. In this case, even if the Petitioners adequately trained all of the other police officers on the force, they did not adequately train Vitale in accordance with state law. Each day that Vitale was sent out on duty without having been to training school was a

separate incident evidencing a municipal policy or custom for which the Town can be held liable under 42 U.S.C. § 1983.

V. The Court Of Appeals Analysis Of Qualified Immunity Did Not Depart From The Supreme Court Decision In Harlow v. Fitzgerald.

The Court of Appeals in addressing Chief Forni's claim of qualified immunity analyzed whether he was entitled to summary judgment based on qualified immunity under the standard set forth in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). *Voutour* at 818-819, 822 n.7. The *Harlow* Court observed that qualified immunity was an attempt to balance competing values of a damages remedy to protect the rights of citizens with the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official activity. *Harlow* at 807. The *Harlow* standard for qualified immunity is that "government officials performing *discretionary* functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818 (emphasis supplied).

During the period that Vitale was a regular police officer, Chief Forni could be expected to know that excessive force by means of a shooting would violate a person's constitutional right provided by the fourteenth amendment not to be deprived of liberty without due process. As the Court of Appeals stated, Chief Forni could be expected to know that his failure to have Vitale attend training school and receive training as to when to

shoot and when not to shoot would give rise to a shooting that would violate a person's constitutional rights. *Voutour,* 761 F.2d at 822 n.7. The constitutional repercussions of Forni's conduct was sufficiently foreseeable that a reasonable person would have known that such conduct violated clearly established statutory and constitutional rights under the standard set forth by the *Harlow* Court.

Also, Chief Forni could not be entitled to qualified immunity under the *Harlow* standard because qualified immunity only applied to the performance of discretionary functions. *See Harlow* at 818. State law required that full time regular police officers be sent to police training school within nine months. See G.L. c. 41, § 96B. This state law was mandatory and Chief Forni acted in violation of the state law by failing to send Vitale to police training school as required. Thus, Forni was not vested with discretion in this situation and, therefore, is not entitled to qualified immunity.

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CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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